
A BILL FOR AN ACT

RELATING TO MEDICAL TORTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Over the years, a number of doctors have
2 retired or left Hawaii, especially the neighbor islands, citing
3 reasons that include high medical malpractice insurance rates,
4 low insurance reimbursement rates, and the high cost of living.
5 Hawaii has been unable to replace these doctors in a manner that
6 provides Hawaii residents timely access to adequate healthcare.

7 Doctors are critical components of our society, providing a
8 very important service to everyone in the state, and addressing
9 the needs and concerns of healthcare providers is a key step
10 toward keeping Hawaii healthy.

11 The purpose of this Act is to address the high cost of
12 medical malpractice insurance and defensive medicine.

13 PART I

14 SECTION 2. Chapter 671, Hawaii Revised Statutes, is
15 amended by adding six new sections to be appropriately
16 designated and to read as follows:

17 "§671-A Limitation on noneconomic damages.

18 Notwithstanding section 663-8.7, in an action on a medical tort



1 claim where final judgment is rendered against a physician
2 specialist, liability of the physician specialist for
3 noneconomic damages, as defined in section 663-8.5, inclusive of
4 all persons and entities to which vicarious liability theories
5 may apply, shall not exceed the maximum award limit under
6 section 671-F; provided that the maximum award limit shall not
7 apply if the claimant's economic damages are less than
8 \$1,500,000.

9 **§671-B Assessing percentage of negligence.** Upon request
10 of any nonsettling healthcare provider against whom a plaintiff
11 alleges a medical tort causing injury, the trier of fact shall
12 consider, in assessing any percentage of negligence or other
13 fault, the negligence or other fault of all alleged parties,
14 including the negligence or other fault of any person or entity
15 who has entered into a settlement with the plaintiff for the
16 claimed damages, regardless of whether the settlement has been
17 determined to have been made in good faith, pursuant to section
18 663-15.5.

19 **§671-C Economic damages.** A trier of fact may render a
20 verdict for the plaintiff in a medical tort action that includes
21 economic damages, including past and future medical expenses,
22 loss of past and future earnings, loss of use of property, cost



1 of repair or replacement, cost of obtaining domestic services,
2 loss of employment, or loss of business and employment
3 opportunities.

4 **§671-D Proportionate allocation of economic damages.** The
5 amount of economic damages allocated to a physician specialist
6 in a medical tort action shall be based upon the physician
7 specialist's proportionate percentage of negligence or other
8 fault.

9 **§671-E Allocation of noneconomic damages.** (a) If the
10 trier of fact renders a verdict for the plaintiff in a medical
11 tort action, the court shall enter judgment of liability against
12 each defendant physician specialist in accordance with the
13 percentage of negligence or other fault for noneconomic damages
14 that is attributed to the physician specialist by the trier of
15 fact; provided that the award shall be limited to an amount not
16 to exceed the maximum award limit under section 671-F for each
17 physician specialist.

18 (b) Judgment shall not be entered against any physician
19 specialist who has not been named a party or has been released,
20 dismissed, or otherwise discharged as a party pursuant to
21 section 663-15.5.



1 §671-F Noneconomic damages; physician specialist maximum
2 award limit. The maximum award limit for noneconomic damages
3 awarded against physician specialists in medical tort cases
4 shall be _____ . This limit shall be superseded by any new
5 maximum award limit set by rule pursuant to chapter 91, by the
6 medical malpractice rate commission established in Act _____ ,
7 Session Laws of Hawaii 2009."

8 SECTION 3. Section 657-7.3, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "**§657-7.3 Medical torts; limitation of actions; time.** [No
11 ~~action for injury or death against a chiropractor, clinical~~
12 ~~laboratory technologist or technician, dentist, naturopath,~~
13 ~~nurse, nursing home administrator, dispensing optician,~~
14 ~~optometrist, osteopath, physician or surgeon, physical~~
15 ~~therapist, podiatrist, psychologist, or veterinarian duly~~
16 ~~licensed or registered under the laws of the State, or a~~
17 ~~licensed hospital as the employer of any such person, based upon~~
18 ~~such person's alleged professional negligence, or for rendering~~
19 ~~professional services without consent, or for error or omission~~
20 ~~in such person's practice, shall be brought more than two years~~
21 ~~after the plaintiff discovers, or through the use of reasonable~~
22 ~~diligence should have discovered, the injury, but in any event~~



1 ~~not more than six years after the date of the alleged act or~~
2 ~~omission causing the injury or death. This six year time~~
3 ~~limitation shall be tolled for any period during which the~~
4 ~~person has failed to disclose any act, error, or omission upon~~
5 ~~which the action is based and which is known to the person.~~

6 ~~Actions by a minor shall be commenced within six years from~~
7 ~~the date of the alleged wrongful act except the actions by a~~
8 ~~minor under the age of ten years shall be commenced within six~~
9 ~~years or by the minor's tenth birthday, whichever provides a~~
10 ~~longer period. Such time limitation shall be tolled for any~~
11 ~~minor for any period during which the parent, guardian, insurer,~~
12 ~~or health care provider has committed fraud or gross negligence,~~
13 ~~or has been a party to a collusion in the failure to bring~~
14 ~~action on behalf of the injured minor for a medical tort. The~~
15 ~~time limitation shall also be tolled for any period during which~~
16 ~~the minor's injury or illness alleged to have arisen, in whole~~
17 ~~or in part, from the alleged wrongful act or omission could not~~
18 ~~have been discovered through the use of reasonable diligence.]~~

19 (a) An action for a medical tort, as defined in section 671-1,
20 shall commence within three years after the date of injury or
21 one year after the plaintiff discovers, or through the use of
22 reasonable diligence should have discovered, the injury. In no



1 event shall the time for commencement of the legal action exceed
2 three years unless tolled for:

3 (1) Proof of fraud;

4 (2) Proof of intentional concealment; or

5 (3) Discovery of the presence of a foreign body that has
6 no therapeutic or diagnostic purpose or effect in the
7 person of the injured person.

8 Upon resolution of proof of fraud, proof of concealment, or
9 discovery of the presence of a foreign body that has no
10 therapeutic or diagnostic purpose or effect in the person of the
11 injured person, the claimant shall have three years from the
12 date of resolution for commencement of legal action.

13 (b) Actions by a minor shall be commenced within three
14 years from the date of the alleged wrongful act, except that
15 actions by a minor under the age of six years shall be commenced
16 within three years, or prior to the eighth birthday of the
17 minor, whichever provides a longer period. The time limitation
18 shall be tolled for minors for any period during which a parent
19 or guardian and defendant's insurer or health care provider have
20 committed fraud or collusion in the failure to bring an action
21 on behalf of the injured minor for professional negligence."



1 SECTION 4. Section 663-11, Hawaii Revised Statutes, is
2 amended to read as follows:

3 **"§663-11 Joint tortfeasors defined.** For the purpose of
4 this part, the term "joint tortfeasors" means two or more
5 persons jointly or severally liable in tort for the same injury
6 to person or property, whether or not judgment has been
7 recovered against all or some of them[-], except as provided for
8 physician specialists as defined in chapter 671."

9 SECTION 5. Section 671-1, Hawaii Revised Statutes, is
10 amended to read as follows:

11 **"§671-1 Definitions.** As used in this chapter:

12 "Future damages" means damages for future medical
13 treatment, care, or custody, loss of future earnings, loss of
14 bodily function, or future pain and suffering of the judgment
15 creditor.

16 [~~+~~] "Health care provider" means a physician or surgeon
17 licensed under chapter 453, [~~a physician and surgeon licensed~~
18 ~~under chapter 460,~~] a podiatrist licensed under chapter 463E, a
19 health care facility as defined in section 323D-2, and the
20 employees of any of them. Health care provider shall not mean
21 any nursing institution or nursing service conducted by and for



1 those who rely upon treatment by spiritual means through prayer
2 alone, or employees of [~~such~~] the institution or service.

3 [~~2~~] "Medical tort" means professional negligence, the
4 rendering of professional service without informed consent, or
5 an error or omission in professional practice[~~7~~] by a health
6 care provider[~~7, which~~] that proximately causes death, injury, or
7 other damage to a patient[~~7~~]; provided that the services are
8 within the scope of services for which the provider is licensed
9 and are not within any restriction imposed by the licensing
10 agency or licensed hospital.

11 "Physician specialist" means a physician or osteopathic
12 physician licensed in this state and board-certified by the
13 American Board of Medical Specialties or Bureau of Osteopathic
14 Specialties in one of the following specialties:

- 15 (1) Emergency medicine;
16 (2) Neurological surgery;
17 (3) Obstetrics and gynecology;
18 (4) Orthopedic surgery; or
19 (5) General surgery.

20 "Recovered" means the net sum recovered after deducting any
21 disbursements or costs incurred in connection with prosecution
22 or settlement of the claim; provided that costs of medical care



1 incurred by the plaintiff and any administrative fees, including
2 overhead costs, are not deductible disbursements or costs for
3 such purposes."

4 PART II

5 SECTION 6. Beginning January 1, 2010, all insurers
6 providing professional liability insurance for health care
7 providers in the state shall implement a premium rate,
8 established by the commissioner, that is based on the average of
9 the premium rates in effect between January 1, 2003, and
10 December 31, 2009, for physicians or osteopathic physicians
11 licensed in this state and board-certified by the American Board
12 of Medical Specialties or Bureau of Osteopathic Specialties in
13 one of the following specialties:

- 14 (1) Emergency medicine;
15 (2) Neurological surgery;
16 (3) Obstetrics and gynecology;
17 (4) Orthopedic surgery, or
18 (5) General surgery;

19 provided that such a premium rate reduction shall not cause
20 imminent insolvency or fail to provide a fair rate of return.

21 SECTION 7. (a) There shall be established in the
22 department of commerce and consumer affairs for administrative



1 purposes, a medical malpractice task force that shall discuss,
2 study, and conduct public hearings to:

3 (1) Develop a strategic plan to address the high costs of
4 medical malpractice insurance rates and propose a
5 maximum award limit on noneconomic damages, which
6 shall take effect on July 1, 2010, if enacted;

7 (2) Study issues including medical tort reform, patient
8 compensation funds, caps on noneconomic damages,
9 health courts, doctor recruitment and retention
10 incentives, and advancing health information
11 technology; and

12 (3) Develop recommendations on damage award ranges and
13 guidelines for malpractice claims based on recent
14 medical malpractice cases. The ranges and guidelines
15 may be used in medical malpractice cases to determine
16 damages.

17 (b) The task force shall comprise the following members:

18 (1) The state insurance commissioner, who shall serve as
19 the chair of the task force;

20 (2) The dean of the University of Hawaii John A. Burns
21 school of medicine, or the dean's designee;



- 1 (3) The president of the Hawaii Medical Association, or
2 the president's designee;
- 3 (4) The president of the Hawaii State Bar Association, or
4 the president's designee;
- 5 (5) The president of the Hawaii Association for Justice,
6 or the president's designee;
- 7 (6) A representative of the medical malpractice insurance
8 industry, who shall be appointed by the governor from
9 a list of three nominees submitted jointly by the
10 president of the senate and speaker of the house of
11 representatives;
- 12 (7) Two members, who shall be appointed by the governor;
- 13 (8) Two members, who shall be appointed by the president
14 of the senate; and
- 15 (9) Two members, who shall be appointed by the speaker of
16 the house of representatives.
- 17 (c) The members of the task force shall serve without
18 compensation but shall be reimbursed for reasonable expenses,
19 including travel expenses, necessary for the performance of
20 their duties.



1 (d) The department of commerce and consumer affairs shall
2 provide all administrative, technical, professional, and
3 clerical support required by the task force.

4 (e) The task force shall submit to the legislature no
5 later than twenty days prior to the convening of the regular
6 session of 2010, a report of its findings and recommendations,
7 including legislation setting a maximum award limit on
8 noneconomic damages, and any other proposed legislation.

9 (f) The task force shall cease to exist on June 30, 2011.

10 SECTION 8. (a) There shall be established in the
11 department of commerce and consumer affairs for administrative
12 purposes, a medical malpractice rate commission that shall
13 convene in 2010, and every three years thereafter, to evaluate
14 factors including:

15 (1) The number of medical malpractice claims within the
16 specialties of emergency medicine, neurological
17 surgery, obstetrics and gynecology, orthopedic
18 surgery, or general surgery, within the previous three
19 years;

20 (2) The increase or decrease in medical malpractice
21 insurance rates as a result of any medical malpractice
22 claims within the previous three years;



- 1 (3) The average medical malpractice insurance rate in
2 other states;
- 3 (4) The estimated savings from the reduction of the
4 practice of defensive medicine; and
- 5 (5) The state of the current local economy, including the
6 latest report from the council on revenues.

7 The commission shall use this evaluation and conduct public
8 hearings to establish by rule adopted under chapter 91, a fair
9 and reasonable market-price medical malpractice insurance rate
10 for physician specialists practicing medicine in Hawaii,
11 including a medical malpractice insurance rate range specifying
12 the minimum and maximum rate price. The commission shall also
13 establish by rule, the maximum award limit for noneconomic
14 damages for physician specialists. Any medical malpractice
15 insurance rate and rate range set by the commission by rule
16 shall supersede the premium rate set by the commissioner in
17 section 6. Maximum award limits set by the commission by rule
18 shall supersede the maximum award limit set under section 671-E,
19 Hawaii Revised Statutes, by the legislature, pursuant to the
20 recommendations of the medical malpractice task force.

21 (b) The medical malpractice insurance rate commission
22 shall comprise the following members:



- 1 (1) The state insurance commissioner, who shall serve as
2 the chair of the commission;
- 3 (2) The director of business, economic development, and
4 tourism, or the director's designee;
- 5 (3) The director of health, or the director's designee;
- 6 (4) The chair of the state council on revenues, or the
7 chair's designee;
- 8 (5) The dean of the University of Hawaii John A. Burns
9 school of medicine, or the dean's designee;
- 10 (6) The president of the Hawaii Medical Association, or
11 the president's designee;
- 12 (7) The president of the Hawaii State Bar Association, or
13 the president's designee;
- 14 (8) The president of the Hawaii Association for Justice,
15 or the president's designee;
- 16 (9) A representative from the Medical Insurance Exchange
17 of California;
- 18 (10) Representatives from each medical malpractice carrier
19 in the state;
- 20 (11) A representative from the banking industry, appointed
21 by the governor from a list submitted jointly by the

1 president of the senate and speaker of the house of
2 representatives; and

3 (12) A representative from the business industry who has a
4 background in economics, appointed by the governor
5 from a list submitted jointly by the president of the
6 senate and speaker of the house of representatives.

7 (c) The members of the commission shall serve without
8 compensation but shall be reimbursed for reasonable expenses,
9 including travel expenses, necessary for the performance of
10 their duties.

11 (d) The department of commerce and consumer affairs shall
12 provide all administrative, technical, professional, and
13 clerical support required by the commission.

14 SECTION 9. The department of commerce and consumer affairs
15 shall submit a report to the legislature no later than twenty
16 days prior to the convening of the regular session of 2013 that
17 identifies any benefits and detriments related to the passage of
18 part I of this Act, including annual statistics reflecting,
19 since the effective date of this Act:

20 (1) The rise or drop in medical malpractice insurance
21 rates for doctors in Hawaii;



1 (2) The increase or decrease of the number of doctors
2 practicing medicine in Hawaii; and

3 (3) Any savings generated by the decrease in defensive
4 medicine costs.

5 The report shall also include any proposed legislation for
6 recommended changes.

7 PART III

8 SECTION 10. Chapter 671, Hawaii Revised Statutes, is
9 amended by adding a new section to be appropriately designated
10 and to read as follows:

11 **"§671-3.5 Duty to notify patients of adverse events;**
12 **definitions; penalty; rules.** (a) Whenever possible, a health
13 care provider or an appropriately trained designee of a health
14 care provider shall notify in person each patient, or the
15 patient's relative or representative, regarding any adverse
16 event that could result in serious harm to or a life-threatening
17 situation for the patient within seventy-two hours of the
18 adverse event or discovery of the adverse event; provided that
19 all applicable federal laws regarding patient care shall apply.

20 (b) The notification under subsection (a) shall not be
21 admissible as evidence of an admission of liability pursuant to
22 rule 409.5, Hawaii rules of evidence, under section 626-1.



1 (c) For purposes of this section, unless the context
2 otherwise requires:

3 "Adverse event" means an untoward incident, therapeutic
4 misadventure, iatrogenic injury, or other undesirable occurrence
5 directly associated with care or services provided by a health
6 care provider as defined under chapter 453, or health care
7 facility as defined under section 323D-2.

8 "Health care provider" means a physician or surgeon or
9 osteopathic physician or surgeon licensed under chapter 453, a
10 podiatrist licensed under chapter 463E, and a health care
11 facility as defined in section 323D-2.

12 "Notify" means to provide all medically relevant
13 information available at the time in regards to the occurrence
14 of an adverse event that resulted in patient harm, or could
15 result in patient harm, within twelve months of the adverse
16 occurrence.

17 "Relative" means the patient's spouse, parent, grandparent,
18 adult children, adult siblings, or any other adult person who
19 has a family-type relationship with the patient.

20 "Representative" means a legal guardian, attorney, person
21 designated to have medical power of attorney, executor of the



1 patient's estate, or any other person recognized in law as a
2 patient's agent.

3 (d) Failure to comply with this section may subject a
4 health care provider to disciplinary action as established by
5 the Hawaii medical board, and any other applicable civil
6 penalties as permitted by law.

7 (e) The Hawaii medical board shall adopt rules in
8 accordance with chapter 91 to carry out the effect of this
9 section."

10 PART IV

11 SECTION 11. Part I of this Act does not affect rights and
12 duties that matured, penalties that were incurred, and
13 proceedings that were begun, before its effective date.

14 SECTION 12. In codifying the new sections added by section
15 2 of this Act, the revisor of statutes shall substitute
16 appropriate section numbers for the letters used in designating
17 the new sections in this Act.

18 SECTION 13. Statutory material to be repealed is bracketed
19 and stricken. New statutory material is underscored.

20 SECTION 14. This Act shall take effect on July 1, 2046;
21 provided that sections 671-A through 671-F shall take effect on



- 1 July 1, 2047; provided further that part I and section 8 of this
- 2 Act shall be repealed on June 30, 2014.



Report Title:

Medical Tort Claims

Description:

Improves the medical tort law by, among other things, setting a maximum award limit for noneconomic damages in medical tort cases against physician specialists. Requires all insurers providing professional liability insurance for health care providers to implement a premium rate established by the State Insurance Commissioner. Establishes the Medical Malpractice Rate Commission. Establishes the Medical Malpractice Task Force. Requires notification of adverse events. (HB1784 HD2)

